BEAUFORD BARU SDN BHD

v.

GOPALA KRISHNAN VK GOPALAN

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 11-18-2001]
9 JULY 2002

CIVIL PROCEDURE: *Time - Extension of time - Counsel, mistake of - Misinterpreting law on time limit for filing notice of appeal - Whether a sufficient reason for exercise of court's discretion to grant extension of time to file notice of appeal - Considerations - Length of and reasons for delay - Merits of appeal - Likelihood and degree of prejudice to other party*

CIVIL PROCEDURE: *Appeal - Notice of appeal - Application for extension of time to file - Refusal of magistrate to grant extension of time to file - Counsel misinterpreting law on time limit for filing notice of appeal - Whether a sufficient reason for exercise of court's discretion to grant extension of time to file notice of appeal*

CIVIL PROCEDURE: *Preliminary objection - Procedural and technical objection - Whether tenable - Whether may still be practised by litigants and entertained by courts - Rules of the High Court (Amendment) 2002, O. 2 r. 3 - Rules of the Court of Appeal (Amendment) 2002, r. 3A - Technicalities obstructing process of dispensing justice to deserving party - Refusal of magistrate to grant extension of time to file notice of appeal*

CIVIL PROCEDURE: *Appeal - Notice of appeal - Filing of - Time limit - Whether 14 days from day on which decision appealed from is pronounced or from day on which decision is perfected - Subordinate Courts Rules 1980, O. 49 r. 2(3)*

The magistrate gave judgment to the plaintiff in a civil suit on 20 September 2000 and adjourned the assessment of damages to 8 November 2000. Upon deciding to appeal, the defendant was advised by its solicitor ('FTA') that the time limit for filing a notice of appeal was 14 days after the delivery of the sealed copy of the judgment. As it transpired, the advice of FTA proved to be misconceived and the magistrate dismissed the defendant's application for an extension of time to file a notice of appeal. This was the defendant's appeal and the only issue that arose for decision was whether a solicitor's mistake in interpreting a provision of the law governing the time limit for filing a notice of appeal was a good and sufficient ground for granting an extension of time to file a notice of appeal.

Held:

[1] An application for an extension of time to file a notice of appeal founded upon a solicitor's mistake in interpreting a provision of the law should **not** be dismissed outright; it should be considered, taking into account factors such as the length of and the reasons for the delay, the merits of the appeal, and the likelihood and degree of prejudice to the other party. (*Soon Huat Construction Sdn Bhd v. Kiong Siang Construction Sdn Bhd* [1999] 3 CLJ 778 HC followed; *Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424 HC followed; *Sinnathamby & Anor v. Lee Chooi Ying* [1987] 1 CLJ 157 FC followed.) The older decisions which held that a solicitor's mistake was not a sufficient reason for the court to exercise its discretion to grant an extension of time were no longer good law. (*Chong Kueng Ying & Ors v. Lovis Lavagna* [1972] 1 MLJ 180 FC not followed; *Tractors Malaysia Bhd v. Southern Estates Sdn Bhd & Anor* [1984] 1 CLJ 154 FC not followed; *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 2 CLJ 449 distinguished.) (pp 689 g-i, 690 a-i & 691 a-f)

[2] The extension of time sought by the defendant to file a notice of appeal was **not** unduly prejudicial to the plaintiff; even if it was, it could be compensated by costs. Furthermore, the magistrate's judgment sought to appealed against was only in respect of liability. Thus in all the circumstances of the case, the mistake of FTA was an acceptable ground for the exercise of the court's discretion to grant an extension of time to the defendant to file a notice of appeal. (p 691 f-g)

[3] The raising of preliminary objections on technical grounds is an expedient of the past. (Rules of the High Court (Amendment) 2002, O. 2 r. 3; Rules of the Court of Appeal (Amendment) 2002, r. 3A.) Mere technicalities should not be allowed to obstruct the process of dispensing justice to the deserving party. (*United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31 CA followed.) (pp 691 h-i & 692 a-g)

Per curiam:

[1] Pursuant to O. 49 r. 2(3) of the Subordinate Courts Rules 1980, it is imperative and mandatory that a notice of appeal is filed within 14 days from the day on which the decision appealed from is **pronounced** and not from the day on which the decision is perfected. (p 689 c-f)

[Defendant's appeal against decision of magistrate refusing extension of time allowed.]

Case(s) referred to:

Chong Kueng Ying & Ors v. Lovis Lavagna [1972] 1 MLJ 180 ***(not foll)***

Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 2 MLJ 424 ***(foll)***

Sinnathamby & Anor v. Lee Chooi Ying [1987] 1 CLJ 157; [1987] CLJ (Rep) 336 ***(foll)***

Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 ***(dist)***

Soon Huat Construction Sdn Bhd v. Kiong Siang Construction Sdn Bhd [1999] 3 CLJ 778 ***(foll)***

Tractors Malaysia Bhd v. Southern Estates Sdn Bhd & Anor [1984] 1 CLJ 154; [1984] 1 CLJ (Rep) 398 ***(not foll)***

United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31

Legislation referred to:

Rules of the Court of Appeal (Amendment) 2002, r. 3A

Rules of the High Court (Amendment) 2002, O. 2 r. 3

Subordinate Courts Act 1948, O. 3 r. 5, Third Schedule, para 22

Subordinate Courts Rules 1980, O. 49 r. 2(3)

For the appellant - Tan Boon Tui; M/s SF Pang & Chandra

For the respondent - En Mohan; M/s Mohan & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal against the decision of the learned magistrate of Melaka who had on 6 April 2001 dismissed with costs the appellant's (defendant's) application in encl. (17) for extension of time to file a notice of appeal.

Facts Of The Case

The defendant's affidavit in support of the defendant's application in encl. (17) was affirmed by one Fatima bt Tahir Ali, an advocate and solicitor having conduct of the defendant's matter herein.

On 20 September 2000, after a full trial in Melaka Magistrate's Court Summons No. 72-493-1995, the learned magistrate gave judgment in favour of the plaintiff and adjourned the assessment of damages to 8 November 2000. The aforesaid learned advocate and solicitor advised the defendant to appeal against the learned magistrate's judgment but averred that she had made a genuine and inadvertent error as to the time limit fixed for the filing of the notice of appeal, in that the judgment cannot be properly called a judgment until and unless it is perfected and that the time fixed for filing the notice of appeal is 14 days after the sealed copy of the

judgment is delivered. She added that the client should not be prejudiced by a *bona fide* error on the part of the solicitor and that there are merits in the appeal.

Parties' Contention And Decision On Appeal

Encik Tan Boon Tui, learned counsel for the defendant, repeated the contention as affirmed in the aforesaid affidavit in support.

Encik Mohan, learned counsel for the plaintiff, submitted that the mistake and delay occasioned by the defendant's solicitor is not a good ground because ignorance of the law is no defence and that this application should be dismissed with costs.

The sole question before me is whether a solicitor's error in interpreting a provision of the law governing the time fixed for the filing of a notice of appeal is a good and sufficient ground to justify the delay and to grant an extension of time to file the said notice of appeal.

The opening sentence in O. 49 r. 2(3) of the Subordinate Courts Rules 1980 which regulates the filing of a notice of appeal from a subordinate court to the High Court reads as follows:

> (3) The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced ...

The entire provision contained in this opening sentence is clear and unambiguous and so full effect should be given to it in that it is imperative and mandatory for the necessary notice of appeal to be filed within 14 days from the day on which the decision (which under O. 49 r. 1 includes a judgment, order or decree) was pronounced. Nowhere was it stated that the time for filing the notice of appeal was to run from the day the judgment was perfected. There is manifestly a misinterpretation, *albeit bona fide,* by the learned advocate having conduct of the defendant's matter.

In so far as the subordinate courts are concerned, para. 22 of the Third Schedule to the Subordinate Courts Act 1948 and O. 3 r. 5 of the Subordinate Courts Rules 1980 confer concurrent powers on our subordinate courts to eg, extend the time prescribed by any written law for doing any act or taking any proceedings, although any application therefor be not made until after the expiration of the time prescribed. These powers are to be exercised by way of discretion. It is a judicial discretion and not being an unprincipled discretion, it must be exercised in accordance with established judicial principles, having regard to all the facts and circumstances of each particular case.

Plaintiff's learned counsel relied on the Court of Appeal decision in *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 2 CLJ 449, where there was a delay on the part of the appellant to serve the notice of appeal out of time, although the same was filed within the time fixed for filing. The Court of Appeal held that there was no reasonable explanation for the failure to serve the notice of appeal and so felt unable to exercise the discretion in the appellant's favour. Nevertheless, the Court of Appeal added that it is axiomatic that there is a wide discretion to extend time in proper and deserving cases, on the basis of some relevant evidential material before the court.

A similar conclusion was arrived at by the Federal Court in *Chong Kueng Ying & Ors v. Lovis Lavagna* [1972] 1 MLJ 180 which was also a case of delay in serving a copy of the notice of appeal on the respondent. The Federal Court held that the mistake by a legal adviser is not a sufficient ground for granting leave to serve the notice of appeal out of time. In *Tractors Malaysia Bhd v. Southern Estates Sdn Bhd & Anor* [1984] 1 CLJ 154; [1984] 1 CLJ (Rep) 398, the Federal Court also held that the mistake of the appellant's solicitors on a point of law cannot constitute sufficient grounds for granting an extension of time to file notice of appeal.

As the power to extend time for doing an act or taking any proceeding is essentially an exercise of discretion, it is necessary to examine the governing established principles. In *Sinnathamby & Anor. v. Lee Chooi Ying* [1987] 1 CLJ 157; [1987] CLJ (Rep) 336 the Federal Court held that since leave to appeal had been obtained, there was in all the circumstances sufficient ground for granting the appellants' application to file the notice of appeal out of time. The Federal Court added that the court is now free to consider the mistake of a legal adviser on its merits in the same manner that the court would exercise its discretion in other cases and that *Chong Kueng Ying & Ors, supra,* and *Tractors Malaysia Bhd, supra,* which excluded the court's discretion in cases where the delay was caused by the mistake of a legal adviser, should no longer be applicable after the coming into force of the Supreme Court Rules 1980. This Federal Court decision in *Sinnathamby & Anor, supra,* was followed by Chong Siew Fai J (later Chief Judge (Sabah and Sarawak)) in *Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1994] 2 MLJ 424 in which his Lordship allowed the plaintiff's application for time to appeal against the stay of execution after a lapse of nearly 1 1/2 years.

In *Soon Huat Construction Sdn Bhd v. Kiong Siang Construction Sdn Bhd* [1999] 3 CLJ 778, Ian Chin, J in a well considered judgment analysed, *inter alia*, the mistake of an advocate as a ground for the exercise of discretion whether or not to grant an extension of time. I am in entire

agreement with the cogent reasoning of the learned Judge and adopt his Lordship's conclusion that an application for an extension of time relying on the mistake of a solicitor should not be dismissed outright but must be considered together with other factors such as the length of the delay and the likelihood of prejudice to the other party, and that those decisions which held that the mistake of a solicitor could not be a ground for the court to exercise its discretion to grant an extension of time were no longer good law.

From the plethora of authorities pertaining to the aforesaid question for determination by this court, and consequentially in the exercise of discretion for the grant of extension of time to file a notice of appeal out of time, the court would normally consider:

1. the length of the delay;

2. the reasons of the delay;

3. the merits of the appeal; and

4. the degree of prejudice to the respondent.

This was set out by Chong Siew Fai, J (later CJ (Sabah and Sarawak) in *Scott & English (M) Sdn Bhd, supra*, who added at p. 429 A-B that:

> These factors are merely a framework or guide for the purpose of exercising the discretion and are not intended to be rigid mandatory requirements. It is not necessary that all the four factors must be in favour of the applicant in order that the discretion may be exercised to the applicant's benefit.

In the instant case, the learned magistrate's judgment sought to be appealed against is only in respect of liability delivered on 20 September 2000 as the assessment of damages had yet to be determined on that date, and so in my view no undue prejudice would be occasioned to the respondent. Even assuming for a moment that there is such a prejudice, the prejudice can be compensated by way of costs. All these factors taken in juxtaposition with the aforesaid mistake of the appellant's solicitor would in my view be sufficient grounds for the exercise of the discretion to grant an extension of time to the appellant to file the notice of appeal in question.

As we move towards the era of facilitating the process of litigation, the raising of preliminary objection on technical grounds would certainly and clearly be a thing of the past. Quite recently, the Court of Appeal in *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31 through the authoritative judgment of Ahmad Fairuz JCA (now Ag.

President of the Court of Appeal and Chief Judge (Malaya)) expressly stated that preliminary objection on a mere technicality should not be allowed to obstruct the process of giving justice to the deserving. The Court of Appeal had no hesitation in overruling the procedural technical objection. This principle is further manifested in the parallel and equipollent provisions in r. 3A of the Rules of the Court of Appeal (Amendment) 2002 (PU(A) 196/2002) and O. 2 r. 3 of the Rules of the High Court (Amendment) 2002 (PU(A) 197/2002) both of which came into force on 16 May 2002 in the following terms.

Preliminary objection on the ground of non-compliance shall not be allowed.	3A. A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)

3. A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

It is clearly the intention and wisdom of the Rules Committee to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections. In my considered opinion, the advent of these amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good.

On the foregoing grounds, I allow the appellant's appeal, set aside the magistrate's order refusing the extension of time and direct that the appellant's solicitors file the requisite notice of appeal at the registry of the Magistrate's Court in Melaka and serve on the respondent on or before 23 July 2002.

In the interest of justice, I order that the appellant do pay to the respondent RM500 costs for the day as this application was brought by the appellant on the basis of the mistake of the solicitor concerned.